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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 48*

SAVANNAH SUGAR REFINING CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, ET AL.,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE SAVANNAH SUGAR REFINING CORPORATION, APPELLANT IN NO. 48.

C. R. HILLYER,
Counsel for Appellant.

October 16, 1950.

* Together with No. 45, *Alabama Great Southern Railroad Company, et al., Appellants* v. *United States, et al.*; No. 46, *Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants* v. *United States, et al.*; No. 47, *Railroad Commission of Texas, Appellant* v. *United States, et al.*, also on appeals from the same Court.

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OPINIONS BELOW.

The opinion of the specially constituted District Court of three judges (R. 173-184) is reported at 88 F. Supp. 982.

The report and supplemental report of the Interstate Commerce Commission (R. 16-74, 75-77) are reported at 270 I. C. C. 591 and 274 I. C. C. 229.

* Together with No. 45, *Alabama Great Southern Railroad Company, et al., Appellants* v. *United States, et al.*; No. 46, *Galveston Chamber of Commerce and Houston Port and Traffic Bureau, Appellants* v. *United States, et al.*; No. 47 *Railroad Commission of Texas, Appellant* v. *United States, et al.*, also on appeals from the same Court.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U. S. Code §§ 1253 and 2101(b), 62 Stat. 928, 962. The final decree of the District Court (R. 189-190) was entered January 12, 1950. The petition for appeal (R. 203) was filed and the order allowing appeal (R. 207) was entered on March 7, 1950. Probable jurisdiction was noted by this Court on May 15, 1950 (R. 460).

QUESTIONS PRESENTED.

1. Whether § 307(d) of the Interstate Commerce Act is a congressional mandate for the prescription of differentials between all-rail and barge-rail rates regardless of relative cost of service or other transportation circumstances and conditions.

2. Whether the Commission may deprive appellant of its inherent advantage of lower cost rail service by establishing differentials where the barge-rail service in the transportation of sugar for appellant's competitors is not supported by demonstrable economies.

3. Whether the Commission may establish joint barge-rail rates without finding that such rates are just and reasonable.

STATUTES INVOLVED.

This appeal involves the interpretation of the following statutory provisions:

Section 307(d) of the Interstate Commerce Act, 54 Stat. 937 [49 U. S. C. § 907(d)], which reads in part as follows:

> "The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

The national transportation policy, 54 Stat. 899, which precedes section 1 of the Interstate Commerce Act [49 U. S. C. § 1], and which reads as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to co-

operate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

Section 3(c) of the Inland Waterways Corporation Act, as amended by section 2 of the Denison Act, 45 Stat. 979 [49 U. S. C. § 153(c)], which reads in part as follows:

"It is hereby declared to be the policy of Congress to continue the transportation services of the corporation until . . . (3) there shall have been published and filed under the provisions of the Interstate Commerce Act, as amended, such joint tariffs with rail carriers as shall make generally available the privileges of joint rail and water transportation upon terms reasonably fair to both rail and water carriers; . . ."

Sec. 1(5)(a) [49 U. S. C. § 1(5)(a).] All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

* * * * *

Sec. 3(1) [49 U. S. C. § 3(1).] It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit

point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

STATEMENT OF THE CASE.

The Savannah Sugar Refining Corporation (referred to hereinafter as Savannah Refinery) is engaged in the refining of imported and domestic cane sugar at Port Wentworth, Georgia, adjacent to Savannah, Georgia. Its product, refined sugar, is transported by all-rail routes in carloads to consuming markets in all the states of the southeast and also to destinations in states north of the Ohio River, covered by the decision of the Commission here under attack. Savannah was a party in interest in the case before the Commission out of which this court action arose.

The case arose out of an order of the Interstate Commerce Commission in its Docket No. 26712, which was an investigation into the reasonableness and lawfulness of existing rates for the through transportation of freight partly by rail and partly by barge from and to various points reached by barge-rail routes, these rates being differentially lower than the all-rail rates from and to the same points. For the most part the rates were those established over a period of years in purported conformity with orders of the Commission entered, without hearings, in various proceedings under Section 3 (e) of the Inland Waterways Corporation Act, as amended by the Denison Act, 45 Stat. 980. In said docket No. 26712, entitled *Rail and Barge Joint Rates,* the Commission issued an original

report, 270 I. C. C. 591, dated July 7, 1948, and a supplemental report, 274 I. C. C. 229, dated June 13, 1949. Therein it prescribed a new system of differentials to be deducted from all-rail rates to make barge-rail rates in most of the territory involved and entered an order June 13, 1949, requiring that they be put into effect (R. 14).

The Commission, in prescribing and ordering the rates in No. 26712, acted under authority purportedly contained in Section 307(d) of the Interstate Commerce Act, as amended, 49 U. S. C. 907 (d), which section, after giving the Commission power to require the establishment of joint rates for rail-water transportation, provides as follows:

> In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water.

The railroads contended that the Commission construed this provision as a statement of Congressional policy and a mandate to prescribe differentials in favor of rail-barge routes regardless of whether there were any demonstrable economies in the cost of service in favor of the rail-barge routes, and regardless of any other transportation circumstances or conditions. The evidence offered by the Commission's cost witness showed that the cost of rail-barge transportation was from 16 to 46 per cent greater than the corresponding all-rail service, depending upon which method of computing costs was used as basis for comparison. (Exhibit 1 before the District Court, Exhibit 1350 before the Commission.)

The Commission said in its original report that it could not find that there were demonstrable economies in the rail-barge service which would justify differentials and it appeared that the prescription of differentials rests solely

upon the supposed Congressional mandate. The railroads felt that the Commission's construction of the law was in error and in violation of the National Transportation Policy stated in an introductory paragraph of the Interstate Commerce Act, and that the differentials were not "justified" by the evidence. On September 20, 1949, they accordingly instituted this court action, alleging that the Commission's decision was abritrary, capricious, unconstitutional and otherwise unlawful.

The Savannah Sugar Refining Corporation intervened before the Interstate Commerce Commission supporting the railroads and asking similar relief, and has been an active party throughout the proceeding before the Commission and before the District Court.

During the course of the hearings before the Commission the Savannah refinery undertook by testimony and exhibits to show that to competitive markets to which Savannah shipped at rail rates from Savannah, the barge-rail rates from New Orleans should be no lower than the all-rail rates on sugar from New Orleans. That competition in the sale of sugar is exceedingly keen and that in this proceeding the volume of sugar moving from New Orleans via barge-rail routes is of outstanding importance.

That the prescription of differentials in favor of joint rail-barge routes which are not justified by demonstrable economies in the rail-barge service gives to shippers of sugar who are in a position to ship via the rail-barge routes, an arbitrary and unfair advantage in reaching competitive markets, over plaintiff which is not in a position to use rail-barge service but who does have available all-rail routes over which the traffic can be moved at a lesser cost than over the competing rail-barge routes. Thus appellant which has available to it the lower cost economical all-rail routes is deprived of this inherent advantage by the arbitrary rate differentials.

The all-rail rates on sugar in carloads from the refinery of this intervener located at Port Wentworth, Georgia, and the all-rail rates on sugar in carloads from competing refineries in the New Orleans district, to the markets involved in this proceeding are reasonable and lawful rates in and of themselves; and said all-rail rates from and to said points also have been fairly related the one to the other, and free from unjust discrimination, as required by the Interstate Commerce Act, for the respective transportation services for all-rail transportation. Therefore, arbitrarily lower differential rail-barge rates from the New Orleans District to said competitive markets, which are not justified by demonstrable economies in the rail-barge service or other transportation circumstances and conditions, result in unduly preferential rates to refiners located in the New Orleans district, and unlawful prejudice to appellant which is forced to pay the higher all-rail rates, in violation of Section 3(1) of the Act to regulate Commerce; and results in relatively unreasonable and unlawful existing relationships between joint barge-rail rates and all-rail rates, and in unreasonably low rates, all in violation of Section 1 of said Act to regulate Commerce.

SPECIFICATION OF ERRORS.

Appellant relies upon all the errors assigned in its Assignment of Errors (R. 204). The basic errors of the District Court, however, may be summarized as follows:

1. The Court erred in failing to set aside the order of the Commission on the ground that the establishment of differentials in favor of the barge-rail service, without a finding that the service costs less to perform than all-rail service, deprives appellant of its inherent advantages of lower cost of service in violation of the national transportation policy.

2. The Court erred in failing to set aside the order of the Commission on the ground that the Commission's finding that differentials between all-rail rates and joint barge-rail rates are justified is inconsistent with, unsupported by, and contrary to its finding that it could not find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries which, from the standpoint of cost of service, would justify differentials.

3. The Court erred in failing to set aside the order of the Commission on the ground that the Commission's order was based upon a misconstruction of the Interstate Commerce Act and the national transportation policy.

4. The Court erred in failing to set aside the order of the Commission on the ground that the Commission is without power to establish joint barge-rail rates in the absence of a finding that such rates are just and reasonable and in the absence of preliminary and subsidiary findings of fact on which such an ultimate finding could rationally be based.

5. The Court erred in failing to set aside the order of

the Commission on the ground that the Commission is without power to establish joint barge-rail rates in the absence of a finding that such rates are not unduly preferential of the New Orleans refiners and unjustly prejudicial of the Savannah refinery.

6. The Court erred in failing to find that it is not in accord with the national transportation policy to discriminate against all-rail shippers by depriving them of their inherent advantages of low-cost economical rail service.

7. The Court erred in failing to find that the "experiment" on the Warrior River, which especially hurts this appellant, is conceded to have been a hopeless failure since its inception many years ago, and that there is no claim made by any one that future experience will alter this status.

SUMMARY OF ARGUMENT.

In summarizing the argument, it is important to note at the outset the order of the Commission instituting Docket No. 26712 (R. 78). The Commission on its own motion there undertook to investigate and determine "the reasonableness and lawfulness otherwise of existing through routes and joint rates," * * * with the view to making such findings in the premises and prescribing such just, reasonable, and otherwise lawful joint rates, rules, regulations, and practices and such reasonable minimum differentials, if any, as the facts and circumstances shall appear to require."

Section 307 (d) of the Act is printed hereinbefore under "Statutes Involved." It provides in part as follows:

> "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water."

The Commission proceeded for years in carrying out the purposes of its order under the above section of the Act.

The Savannah Refinery accepted the issues thus raised in good faith and undertook to show upon the record the unlawful and discriminatory effect of the existing barge-rail rates from the New Orleans refineries in competition with the Savannah Refinery paying rail rates.

The existing barge-rail rates referred to in the order in No. 26712 were assumed to be justified by lower costs of service. After reciting the history of the "experiment," the Commission found:

"In the face of these facts, we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrior, which from the standpoint of cost of service would justify differentials (R. 36).

After reciting further history of the "experiment" the Commission finds that:

"Viewing the facts before us in the light of the clear congressional policy with respect to water transportation on the Mississippi River and its tributaries, we conclude that joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified" (R. 44).

In making the above finding the Commission in effect abandoned its order in No. 26712 and the record made thereunder with respect to the lawfulness and reasonableness of existing differential rates under the substantive provision of the Act. Its finding is based upon what the Commission conceives to be the general congressional policy towards the "experiment."

It is well established by decisions of this Court that orders of the Commission must be based upon the sub-

stantive Transportation standards of the Interstate Commerce Act rather than upon mere general expressions of congressional policy. *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658. *United States* v. *New York Central R. R.*, 263 U. S. 603. In each of these cases, the Court set aside an order of the Commission which had the same defect as the order here involved.

In addition to the misconstruction of the Interstate Commerce Act as above set forth, this appellant especially invites the attention of the Court to its lawful right, under the national transportation policy, to rates that are free from undue prejudice to one shipper and unjust preference of another, in violation of Section 3 (1) of the Act. Sugar moves in volume in interstate commerce and is so highly competitive that the cost of transportation determines the sale. The rates therefore must be lawfully, fairly and reasonably adjusted as required by the Act.

The existing barge-rail rates are in violation of Section 3 (1) of the Act in that they are not supported by any demonstrable economies of service as the Commission has found, and in that they unlawfully deprive the Savannah Refinery of its inherent advantages of low cost economical rail transportation.

ARGUMENT.

THE COMMISSION AND THE DISTRICT COURT FAIL TO COMPLY WITH THE ORDER INSTITUTING THIS INVESTIGATION.

Before the Commission the Savannah refinery assailed the existing differential rates on sugar from New Orleans, and sought a finding that said rates should be on no lower basis than the corresponding basis of all-rail rates on sugar from New Orleans in the total absence of demonstrable economies justifying differential rates. This brief will deal primarily with the subjects set forth in appellant's complaint, namely the arbitrary and unlawful effect of differential rates from New Orleans upon the Savannah refinery shipping sugar in competition therewith upon all-rail rates.

The Savannah Sugar Refining Corporation, a so-called dry-land or all-rail shipper of sugar, is here seeking the enforcement of Section 1(5) of the Act to regulate commerce that interstate rates of transportation shall be just and reasonable; and Section 3(1) of said Act that rates shall be free from undue prejudice and unjust preference. With respect to these two sections, Mr. Justice White has stated that "It cannot be challenged that the great purpose of the Act" is contained in these two Sections. (*New York, New Haven & Hartford R. R. Co.* v. *I. C. C.*, 200 U. S. 361, 391.)

In line with the foregoing principles that stand first and foremost in the proper administration of the Act, the order of the Commission instituting this investigation, No. 26712, states that it was for the purpose of determining "the reasonableness and lawfulness" of "existing

through routes and joint rates" via the rail and water carriers, operating upon the Mississippi and Warrior rivers, and also "the reasonableness of existing differentials between all-rail rates and corresponding barge-rail rates and the fixing of reasonable minimum differentials, *if any*," between the all-rail rates and the barge-rail rates. (Italics supplied.) (R. 14.)

Moreover, Section 307 (d) also undertakes to safeguard the rights of this appellant.

> "In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water * * *"

With the foregoing statement of the position of appellant, and the Sections of the Act, and the order of the Commission instituting this proceeding justifying said position of appellant, the Court's attention is invited to the utter abandonment by the Commission of everything it set out to accomplish in this case, and the substitution therefor of a decision based upon general expressions of Congressional policy rather than upon the substantive provisions of the Act. The Commission did not even purport to test the reasonableness and lawfulness of the rates and differentials which it prescribed by any substantive provisions of the Act. It made no attempt to base its order on evidence before it. It simply regards the policy of Congress as requiring differentials regardless of any transportation circumstances and conditions, and regardless of the unlawful effect of such action upon shippers by rail.

In other words the decisions of the Commission and the Court have repealed for this case the substantive sections

of the Act, (Sections 1(5) and 3(1)) as effectively as if they never existed.

That Section 3 of the Act may be said to be the most important provision as recognized by the Supreme Court in many decisions. Both the Commission and the Courts have demanded that Section 3 of the Act be broadly construed and strictly enforced.

> "It was chiefly because of discriminations in freight rates that the Commission was originally established. Section 3 lies at the heart of the Act. It (Section 3) is stated in very broad terms and it should be broadly construed and strictly enforced." (*Barrett* v. *A. T. & S. F.*, 172 I. C. C. 319, 336.)

The Supreme Court has always placed Section 3 of the Act in a position of outstanding importance. Mr. Justice Harlan:

> "The purpose of congress was to cutup by the roots every form of discrimination, favoritism, and inequality." (*Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467, 478.)

Mr. Justice White:

> "It cannot be challenged that the great purpose of the Act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism." (*New York, New Haven & Hartford, R. Co.* v. *I. C. C.*, 200 U. S. 361, 391.)

At no place in its discussion of the justification for differentials does the Commission refer to any of the rate-making provisions of the Interstate Commerce Act, nor is any attempt made to pass upon the reasonableness or lawfulness otherwise of the joint rates and differentials from

the standpoint of any transportation circumstances and conditions. The discussion of the justification for differentials was concluded by the Commission with the following ultimate findings, 270 I. C. C. at 613 (R. 44):

> "Viewing the facts before us in the light of the clear congressional policy with respect to water transportation on the Mississippi River and its tributaries, we conclude that joint barge-and-rail routes and rates generally are necessary and desirable in the public interest and differentials between such rates and all-rail rates are justified."

The Commission began this proceeding by its order in No. 26712 in 1934 to determine lawful, reasonable, and non-discriminatory differential barge-rail rates under Sections 1 and 3 of the Act based upon transportation conditions. But the Commission did not follow through. After completing the investigation through the years with a voluminous record which refuted the myth of cheap barge-rail transportation, the Commission abandoned the purposes of its order of 1934 and the record made thereunder, and switched its decision to carrying out of a policy of fixing lower differential rates regardless of transportation factors developed in the record before it, as admitted in its decision. (R. 44.)

THE COMMISSION MISCONSTRUED THE LAW IN SETTING ASIDE THE SUBSTANTIVE PROVISIONS OF THE ACT.

Section 307 (d) of the Act (*supra*, p. 3) contains the authority of law here to be administered. The Commission is there authorized to fix such reasonable differentials as may be justified by the facts of record. In *Inland Waterways Corp.* v. *A. G. S. R. Co.*, 151 I. C. C. 126 (44) it is held that:

> "The barge-line differentials are based upon the

> premise that the service costs less and is worth less than the rail service with which it competes. From the standpoint of public policy, however, the important factor is the lesser cost of the service, for there could be no justification for encouraging an inferior service having a higher cost."

Heretofore, no one has questioned the above well-ascertained principle upon which this proceeding should turn. In fact, this guiding principle has been restated by all parties from time to time throughout the pendency of this proceeding. For example, we find on page 15847 of the reopened hearing (Exhibit 1 before the District Court) the following unchallenged statement by the Examiner:

> "You (the barge-line) have admitted that if there is no saving in transportation (costs) through the use of the Federal Barge Line, that the Federal Barge Line has no place in the picture."

As stated hereinbefore this entire proceeding before the Commission from its inception rested upon the well-accepted principle of relative costs of performing the transportation service. Thousands of pages of testimony and scores of elaborate schedules of cost formulae and studies from highly qualified specialists were offered by both sides. Through the years the proceeding was continued from time to time for months to permit the completion of this definitely controlling evidence, upon the result of which it was conceded by all parties the conclusion of the Commission upon the main issue, the reasonable differential between the all-rail and the barge-rail rates, would finally be determined. It was only after the record disposed of the myth of cheap barge-rail transportation that this switch to Congressional policy was made.

Appellant invites the Court's attention to the limitations placed upon the Commission in defining the policy of Congress (*supra*, p. 4). It is there stated that in carrying out the policy of Congress, all charges thereunder shall be "without unjust discriminations, undue preferences or advantages or unfair destructive competitive practices." Moreover, said section concludes as follows:

> "All the provisions of this act shall be administered and enforced with a view to carrying out the above declaration of policy."

This Court in the *Ann Arbor* case said:

> "The question presented is whether the resolution changes the substantive provisions of existing laws relating to transportation rates, and particularly whether rates which would be lawful under those laws are made unlawful by it.
>
> * * * * *
>
> "We are of opinion that the Commission's construction cannot be supported. The paragraph does not purport to make any change in the existing law, but on the contrary requires that that law be given effect. Nor does it purport to make unlawful any rate which under the existing law is a lawful rate, but on the contrary leaves the validity of the rate to be tested by that law." 281 U. S. at 665-6, 668.

EFFECT OF EXISTING UNLAWFUL RATES OF INTERSTATE TRANSPORTATION UPON THE OPERATIONS OF APPELLANT.

The Commission having declined to administer the Act in accordance with its order instituting No. 26712, and the substantive provisions of the Act, we now invite the Court's attention to the unlawful effect of such action upon this appellant.

The vital importance of a lawfully adjusted rate re-

lationship in the transportation of sugar is set forth in the following decision, among others:

> "It is the common practice of jobbers and manufacturers to make allowances in prices, and thus reduce their profits, where necessary to meet the price of competitors enjoying freight rates on lower bases. A shipper's enforced absorption of an unjustified difference in freight rates in the sale of his products results in undue prejudice to him. The undue prejudice is more pronounced when a rate maladjustment precludes him from doing business in which he might engage if rates were equitably related." (*Consolidated Southwestern Cases*, 123 I. C. C. 211.)

Competition in the sale of sugar is extremely sharp and the rate of transportation controls the sale. During the course of the hearing before the Commission there was received testimony pertaining to the extreme keenness of competition always present in the marketing of sugar. This testimony was in part from the president of this appellant. It is there pointed out that sugar is sold on the basis of the lowest rate on sugar to a given market from any refinery. That a refinery having a higher rate, in order to compete, must absorb the difference in the rate. That at the time of this testimony this appellant had thus absorbed on sales of sugar in the State of Alabama $169,326; on sales in the State of Tennessee intervener had thus absorbed $143,942; and on sales in the State of Kentucky $150,864; or a total absorption of $464,133 in these three states alone. (Exhibit 1, before the District Court, pp. 14184-14196.) These absorptions are only a portion of the total absorptions, but are illustrative of the extreme burden forced upon appellant by barge-rail rates which are permitted to continue by the decision of the Commission.

The all-rail rates on sugar in carloads from the Savannah refinery and the all-rail rates on sugar in carloads from competing refineries in the New Orleans district, to

the markets involved in this proceeding, have all been determined as just, reasonable and lawful rates in and of themselves; and said all-rail rates from and to said points also have been fairly related the one to the other, free from unjust discrimination, as required by the Interstate Commerce Act, for the respective transportation services for all-rail transportation. Therefore, arbitrarily lower differential rail-barge rates from the New Orleans district to said competitive markets, which are not justified by demonstrable economies in the rail-barge service, or other transportation circumstances and conditions, result in unduly preferential rates to refiners located in the New Orleans district, and unlawful prejudice to this appellant in violation of Section 1 and Section 3 (1) of the Act, in that the Savannah Refinery is unlawfully deprived of its inherent advantages of low-cost rail transport.

THE COMMISSION SPECIFICALLY DECLINED TO PROTECT THE INHERENT ADVANTAGES OF APPELLANT.

The decision of the Commission describes sugar as of outstanding importance to the barge lines. The record shows important tonnage of sugar moving from the New Orleans district by barge. A heavy percentage of this movement is on port to port rates not involved in this case, and therefore would not be affected by a proper adjustment of the barge-rail rates which are involved herein. The movement upon the barge-rail rates in competition with Savannah, in the absence of any demonstrable economies, deprives Savannah of its inherent advantages of low-cost rail transport and makes Savannah the outstanding victim of the existing differential rates.

On the facts thus submitted, appellant requested the Commission to find that there was no factual basis for the existing differential rates on sugar and that said rates were in plain violation of Sections 1 and 3 of the Act.

The existing differential rates on sugar are merely temporary, awaiting the outcome of this proceeding as to their lawfulness. The Commission's order instituting this proceeding raised the issue as to the lawfulness of "existing differentials." The decision of the Commission enters no finding whatever on this main issue, although the Savannah Refinery requested such finding and supported it with ample testimony and exhibits, showing undue preference of New Orleans and unjust prejudice of Savannah in violation of Section 3 of the Act. The Commission unlawfully withheld corrective action.

The decision of the Commission states with reference to the commodity sugar that a large amount of evidence concerning sugar rates was presented in this proceeding. "That the barge and rail rates on sugar have a vital relation to the general competitive rate relationships in sugar from all producing points to midwestern consuming points, and we consider it highly desirable that no change in sugar rates be made as a result of our findings here". (P. 617.)

This finding is "negative in form but affirmative in substance" as the Supreme Court stated in the case cited below. This finding arbitrarily authorizes the continuation of the unjustified barge rail rates on sugar from New Orleans. The order of the Commission makes the report a part thereof.

In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 142, the Supreme Court said that an order of the Commission (and the order makes the findings a part thereof), dismissing a complaint on the merits and maintaining the status quo is a well-ascertained exercise of administrative function, no more and no less, than an order directing some change in status. See also *Schenly Corp.* v. *United States*, 326 U. S. 432 and *El Dorado Oil Works* v. *United States*, 328 U. S. 12.

Interstate Commerce Commission v. *Mechling*, 330 U. S.

567, established the principle for which Savannah is contending, namely that the lower cost of barge operation shown in that case, contrary to the showing in the instant case, was an inherent advantage that the Commission had no discretion to take away. In that case this court said at page 579:

> "It is therefore not within the province of the Commission to adjust rates, either to equalize transportation cost of barge shippers with that of shippers who do not have access to barge service, or to protect the traffic of railroads from barge competition."

The "fair and impartial regulation" called for by the national transportation policy demands that the rule of the *Mechling* case be applied impartially and that it protect the inherent advantages of shippers by rail to the same extent that it protects the shippers by barge. This, the Commission refused to do when it specifically declined to administer Sections 1(5) and 3(1) of the act in this case as its order in No. 26712 and the record made thereunder contemplated.

The Court erred in accepting the Commission's finding that no changes in the present barge-rail rates on sugar shall result from its decision, when the main purpose if not the only purpose of its order instituting this proceeding was to give relief from the existing unlawful barge-rail rates. There is no finding whatever as to the lawfulness or the reasonableness of the present barge-rail rates on sugar. On the contrary, the Commissioner writing the decision describes these differential barge-rail rates prescribed as "more or less arbitrary." (270 I. C. C. 591, 620.)

And this Court, in the *Mechling* case, *supra*, 574, in referring specifically to section 307 (d), said:

> "But the congressional debates and committee reports on the 1940 Act and the statutory provisions

> which emerged from this legislative background show that Congress enunciated positive policies and specific limiting standards which it expected the Commission to follow in fixing rates, including 'differentials' between all-rail and water-rail rates."

The national transportation policy states that all provisions of the Act are to be administered and enforced with a view to carrying out the declaration of policy. Differentials are justified and reasonable only to the extent that they accord to all modes of transportation "fair and impartial regulation * * * so administered as to recognize and preserve the inherent advantages of each." 54 Stat. 899.

THERE ARE NO DISABILITIES IN BARGE SERVICE IN THE TRANSPORTATION OF SUGAR.

The only reason heretofore recognized for a lower barge-rail rate is the claim that the service costs less and at the same time is worth less. (R. 177.) These two facts both must be shown of record and found to exist by the Commission. During the course of the hearings before the Commission there was received in evidence testimony pertaining to the peculiar value of the barge service in the transportation of sugar. This testimony was in part from the witnesses representing the competing New Orleans refiners, and also from an officer of the Federal Barge Line. It is there pointed out that the slower movement by barge is eagerly sought for and used by the New Orleans refiners as it affords free storage pending sale, nets heavy profits on a rising sugar market, and incurs no loss to the purchaser on a declining market due to the Commercial customs pertaining to the sale of sugar. (Ex-

hibit 1 before the District Court pp. 14184-14206; Exhibit 1252, p. 14166.)

The higher cost of service in transporting sugar via barge-rail routes, coupled with the greater value of the barge-rail service in the transportation of sugar by barge, render the lower barge-rail rates from New Orleans unlawful and discriminatory against appellant, in violation of Section 3 (1) of the Act. So far as sugar traffic is concerned, the only recognized basis for differential barge-rail rates, namely that the service costs less and is worth less, does not exist.

THE DISTRICT COURT PALPABLY MISSTATES THE POSITION OF THE SAVANNAH REFINERY.

The Court erred in stating that the Savannah Refinery was seeking to deprive its competitors of the advantage of location on the river. (R. 183.) Nothing could be further from the truth. There is not a line of evidence to support it, and our position throughout the proceeding has been and is that anyone having natural advantages of location are entitled to them. The Savannah Refinery is here seeking to protect its right to the inherent advantage of lower-cost rail transport so found upon the record by the Commission. (R. 36.) No one is objecting to giving the New Orleans refiners the benefit of their location on the river. If th y have any such natural advantages they are entitled to them under the law.

These carriers, rail and water, are chartered to serve the public, not each other, at reasonable and non-discriminating rates. Government subsidies maintain for our competitors a transportation service at the expense of ourselves and other taxpayers. Additionally, the Commission here proposes to grant them the unnatural advantage of lower barge-rail differential rates even though

it finds that there are no demonstrable economies to justify such rates. There is no public policy that does or can support such an evil theory of transportation.

THE "EXPERIMENT" ON THE WARRIOR RIVER HAS BEEN OPERATING AS A HOPELESS FAILURE FOR TWENTY-SEVEN YEARS.

The Commission and the District Court erred in failing to find that the barge-rail service via the Warrior River has always in the past and still continues to operate at a heavy financial loss; that all the economies of operation on the Warrior River have been exhausted; that the Federal barge line has abandoned all hope of successful operation. More importantly, that the foregoing facts were found by the Examiner of the Commission as set forth in his reports. (R. 225.)

The "experiment" that the Commission mentions in its decision has been in operation on the Warrior River in Alabama for over twenty-seven years. During every one of these years it has incurred a heavy operating loss to the Federal Barge Line. Moreover, the undisputed evidence is that due to the narrow tortuous channel and other physical disabilities the operation will always incur heavy loss. The report of the Examiner states that "clearly they have no hope of putting the Warrior service on a paying basis, although there seems to be no present intention of discontinuing that operation." (R. 269.) This operation has long since ceased to be an experiment. It is a fully developed and hopeless failure, and it is time to stop this shocking waste. (Exhibit No. 1 before the District Court, p. 10053; Ex. 1350, p. 33.)

The Examiner recognizing the unlawfulness of the existing differential in rates states that if the barge line "performed service at less than cost, it would be guilty of an unfair and destructive practice which might call for the

exercise of the Commission's restraining powers." (R. 225.)

The record shows that the upstream tonnage on the Warrior has been principally sugar from the New Orleans district, moving right into the heart of the district that the Savannah refinery was constructed to serve, at preferential barge-rail rates lower than the cost of service. As pointed out hereinbefore, intervener was forced to absorb the differential between the all-rail rates and the differential rates in the sum of $464,133.00, up to the time of the hearing on tonnage in three states alone. (Exhibit 1 before District Court, p. 14196.)

In view of these admitted facts as to the Warrior River operation, the approval of any differential whatever between the all-rail rates and the barge-rail rates results in unreasonable rates in violation of Section 1 of the Act, and also rates that unjustly prefer the shippers of sugar from New Orleans, and unduly prejudice Savannah in violation of Section 3, of the Act. There is no public policy that permits the charging one shipper an established all-rail reasonable rate, and charging a competitor a rate that does not pay for the service received.

The act authorizes the Commission to fix "reasonable differentials," and that expression connotes rates that yield cost of operation and a return on investment or value. In view of the admitted facts as to the Warrior River operation, the Commission is precluded as matter of law from prescribing any differential whatever on sugar moving on the Warrior River route. A differential under such conditions is merely a naked unlawful preference.

THE EXAMINER FOUND THAT THERE WAS NO BASIS FOR PRESCRIBING COMMODITY BARGE-RAIL RATES.

The Commission fixes the differential on class rates as distinguished from commodity rates, and then states that commodity rates shall be published on similar ratios. Sugar pays interstate rail rates upon the commodity basis.

The Examiner refers to the nature of commodity rates as dealing with special situations (such as the important competitive movement of sugar), as distinguished from class rates that are a fixed standard for general traffic. He refers to the evidence before the Commission dealing with commodity rates and says that "the age of that evidence raises doubt whether it portrays the present situation," and rightly declines to approve any basis of commodity rates. This Court has held that a lawful order can not rest upon a stale record. (*Atchison, Topeka & Santa Fe* v. *U. S.*, 284 U. S. 248.)

The Examiner finds that "In view of the foregoing circumstances, it seems necessary that the findings in this proceeding be restricted to class and column rates." (R. 273.)

Notwithstanding this finding of its Examiner the Commission goes ahead and orders differential commodity barge-rail rates. The movement of interstate traffic in this country by volume upon Commodity rates is many fold that moving upon class rates. The action of the Commission in arbitrarily prescribing class rates upon some basis wholly unsupported by essential findings of fact; and then following that up by merely saying that this same undisclosed basis shall apply on barge-rail Commodity rates from New Orleans, also without any basic finding of fact, is patently arbitrary and unlawful.

ARTICLE 1, SECTION 9, CLAUSE 6 OF THE CONSTITUTION PROHIBITS A PREFERENCE OF THE PORTS OF ONE STATE OVER THOSE OF ANOTHER.

The Savannah refinery adopts the argument in the brief of the Texas interveners on the subject of the unconstitutionality of the decision in administering Section 307 (d) of the Interstate Commerce Act in such manner as to prefer one port over another. The record in 26712 shows that Savannah as a port is in competition with the port of New Orleans and is affected in the same way as are Galveston and Houston in competition with New Orleans. The State of Louisiana is thus unconstitutionally preferred by the failure of the Commission to raise the barge-rail rate on sugar from New Orleans to the lawful basis of the all-rail rate.

CONCLUSION.

We have shown hereinbefore the continuing unlawful effect upon the Savannah Refinery flowing from the existing barge-rail differential rates for the interstate transportation of sugar. There is no lawful basis for differential barge-rail rates on sugar from New Orleans lower than the all-rail rates. The Court's attention is invited to the section of the Commission's report entitled "The Justification for Differentials", 70 I. C. C. 609-13. (R. 39-44.) A mere reading thereof leads to the inescapable conclusion that the Commission did not even purport to test the reasonableness and lawfulness otherwise of the rates and differentials which it prescribed by any substantive provision of the Interstate Commerce Act. It made no attempt to base its order on the evidence before it. The order is admittedly based upon the Commission's interpretation of certain general expressions of congressional policy as a mandate for the prescription of differ-

entials between all-rail and barge-rail rates lower than rail rates, regardless of relative cost of service or other transportation circumstances and conditions developed upon the record before it. The Commission's order is not supported by essential findings or substantial evidence and there is no rational basis for the order. It has exceeded its authority, and its action is arbitrary, unlawful and void.

The judgment of the District Court should be reversed and the case remanded to that Court with directions to set aside the order of the Commission and for further proceedings in conformity with the opinion of this Court.

Respectfully submitted,

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